IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 286

E. ANTHONY & SONS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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August 21, 1947.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

E. Anthony & Sons, Incorporated, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia to review an order and decree of said court entered on June 23, 1947, (R. 330), enforcing an order of the National Labor Relations Board (hereinafter called the Board) entered August 26, 1946, (R. 62) which directed petitioner to cease and desist from certain unfair labor practices under the National Labor Relations Act (hereinafter called the Act) 49 Stat. 449; 29

U. S. C., Supp. V, Sec. 151 *et seq.* and to take certain affirmative action.

The opinion of the Court of Appeals for the District of Columbia (R. 320-329) is as yet unreported. The decision and order of the Board (R. 56-68) are reported at 70 N. L. R. B. 717.

A.

Statement of the Matter Involved.

Petitioner is the publisher of two newspapers, The Standard-Times at New Bedford, Massachusetts, and the Cape Cod Standard-Times at Hyannis, Massachusetts (R. 21-22).

Some time prior to January 27, 1945, Max Kramer, then general business manager of petitioner, and William H. Cooper, circulation director of petitioner's newspapers, concocted a scheme to deprive petitioner of control over the circulation of its two newspapers by organizing two associations into which they planned to bring all persons connected with the distribution of the New Bedford Standard-Times and the Cape Cod Standard-Times. One of these organizations was called "Newspaper and Radio Workers' Protective Association of Southeastern Massachusetts" and the other was called "Newspaper Carriers' Association of Southeastern Massachusetts." Application cards for membership in the "Workers Association" had been printed in a union shop at Cambridge, Massachusetts, on Kramer's orders prior to January 27. (Bd. Exs. 2 and 5; R. 269, 271, 272)

On that day petitioner discharged Kramer. The record is undisputed that at the time it discharged Kramer, petitioner knew nothing of the scheme.

Subsequent to Kramer's discharge, petitioner learned of another scheme concocted by Kramer and Cooper. Petitioner learned that during 1939 and again during 1944 Kramer and Cooper had taken over a portion of petitioner's business without petitioner's knowledge and that they had realized a profit of several thousands of dollars from this breach of faith. These facts were brought to the attention of the Grand Jury and on January 16, 1947, Kramer and

Cooper pleaded guilty to an indictment charging them with conspiring to conduct a business in competition with their employer in violation of their duties to their employer (R. 306).

Following Kramer's discharge and almost immediately thereafter these events occurred:

On the same day several of petitioner's employees signed application cards which were given to them either by Kramer or by Mary Harden, secretary to Cooper.

The employees of petitioner's circulation department were speedily "organized" by petitioner's sub-executives and supervisory employees, all of whom were subject to Kramer's control prior to his discharge and all of whom were directly subject to Cooper's control.

John Silveira, petitioner's city circulation manager at New Bedford, was assigned the task of soliciting the branch circulation managers, the district circulation managers and other employees of the circulation department (R. 81).

Mary Harden, head circulation bookkeeper and private secretary to Cooper actively solicited her subordinates (R. 129).

Edmund B. Ellison, circulation manager of petitioner's newspaper at Hyannis, solicited his subordinates (R. 201).

On January 30, 1945, the Association held a meeting at which Kramer, the discharged general business manager, was elected president; John Silveira, city circulation manager of petitioner's newspaper in New Bedford, was elected vice-president; Mary Harden was elected secretary; and William H. Cooper, petitioner's circulation director, was elected treasurer and business agent (R. 81, 83, 129-130, 153-4, 254).

On February 1, 1945, Cooper sent a telegram to petitioner resigning his position as circulation director (Bd. Ex. 3; R. 270).

The record is undisputed that prior to the receipt of Cooper's telegram, petitioner knew nothing of his activities. The record is clear that the employees in petitioner's

circulation department had been effectively "organized" before Cooper resigned (R. 81-82, 254).

Cooper, concurrently with his resignation, formally notified petitioner of the organization of the Association and demanded a conference for the purpose of negotiating a contract between petitioner and that Association. Petitioner ignored this request whereupon the Newspaper and Radio Workers' Protective Association asked the National Labor Relations Board to certify and designate it as the collective bargaining representative for all of petitioner's employees in petitioner's circulation department (Case No. 1-R-2296).

In addition to organizing the Newspaper and Radio Workers' Protective Association, Kramer and Cooper also organized as an auxiliary of that Association another organization which they called the Newspaper Carriers' Association of Southeastern Massachusetts and through Cooper made demand upon petitioner to negotiate a contract with that Association governing the conditions of delivery of its newspapers in the City of New Bedford (R. 291). Petitioner ignored this demand whereupon a request for certification and designation as collective bargaining agent was filed with the Regional Director of the Board at Boston (Case 1-R-2310).

Petitioner on February 8, 1945, was summoned by the Regional Director at Boston to appear at his office on February 13, for a conference concerning these two representation proceedings. Because petitioner's counsel had conflicting engagements the conference was not held until February 23, 1945.

The record is undisputed that after it received Cooper's letter petitioner made inquiry as to the nature of the Association. This inquiry developed the fact that with the approval of Cooper while in petitioner's employ, John Silveira, petitioner's city circulation manager in New Bedford, and Edmund Ellison, circulation manager of the Cape Cod Standard-Times at Hyannis, had compelled newspaper boys operating under contracts with petitioner to kick in

part of their earnings to a "kitty," the expenditure of which funds was solely in control of Silveira and Ellison and subordinates of Ellison who at his direction had set up such a "kitty." As soon as petitioner learned of these "kitties" it discharged Silveira and Ellison and offered to make whole any newspaper boy who had been compelled by them or their subordinates to pay money into "kitties." Petitioner also learned that under the direction of Kramer, Cooper, Silveira and Ellison, efforts were being made to persuade carrier boys to break their contracts with petitioner. William Thompson, a district circulation manager of the Hyannis newspaper, was discharged on February 15, 1945, for soliciting carrier boys to break their contracts with petitioner (R. 204). Inducing carriers to break their contracts was also one of the reasons for Ellison's discharge (Bd. Ex. 13; R. 277).

Also, upon learning of the efforts of Kramer, Cooper, Silveira, Ellison, and others to persuade newspaper carrier boys to break their contracts, petitioner proceeded in the Superior Court of Massachusetts to enjoin Kramer, Cooper, the Newspaper and Radio Workers' Protective Association and the Newspaper Carriers' Association from interfering with existing contracts between petitioner and the carrier boys who purchased petitioner's newspapers at wholesale rates and sold them to their customers at retail. After answer by the defendants in that proceeding and following hearing, the Court enjoined Kramer, Cooper, their agents, servants and attorneys "from interfering with the existing contracts between the petitioner and the carrier boys" in question (Resp. Ex. 7; R. 294). That injunction was in full force and effect at the time the complaint herein was issued. On August 7, 1947, a decree permanently enjoining Kramer and Cooper and their agents from the activities complained of was entered in the Superior Court of Massachusetts.[1]

[1] For the information of this Court the findings, rulings and order for decree of the Superior Court of the Commonwealth of Massachusetts are set out in Appendix B attached to this petition and brief. It is respectfully requested that judicial notice be taken of Appendix B.

On February 13, Mary Harden was discharged for refusal to carry out instructions of her immediate superior and for interfering with the work of others including the calling of another female employee a "son-of-a-bitch." On February 14, Sylvester Boff, an advertising solicitor employed in the Cape Cod Standard-Times published by petitioner at Hyannis, Massachusetts, was discharged for failure to produce results. The record is undisputed that over a period of months Boff brought in little business. The sum total of his production in a period of approximately six months was only about $120 more than the salary and allowances paid to him or for his account by petitioner.[2]

The discharges of Silveira, Harden, Ellison, Thompson and Boff were all made prior to Sunday, February 18, 1945. On that day the Newspaper and Radio Workers' Protective Association was turned over lock, stock and barrel to the American Newspaper Guild, C.I.O., by Kramer and Cooper. Kramer resigned as president and Silveira was elected to his place. Harden was continued as secretary and also elected treasurer of the Guild organization in place of Cooper.

Bilsborrow Ainsworth was discharged from petitioner's garage on February 21 because of his failure to keep trucks in operating condition and sending such trucks out in dangerous shape on February 10, 11, 12 and 13. On March 20, 1945, petitioner discharged Manuel Simas, a part-time truck driver. Petitioner made it clear to Simas that he was being discharged for having wet bundles every week, for refusing to unload a truck at Branch A and for causing a riot at Branch C (R. 228).

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[2] Boff was not an employee of the circulation department but of the advertising department. At the time he was discharged he was not even a member of the units which the Kramer-Cooper Associations sought to represent (Cases 1-R-2296 and 1-R-2310). The only claim for representation by the one was for "All employees of the Circulation Department, excluding the Circulation Manager" (Case 1-R-2296). The only claim advanced by the other was for "All newspaper carriers employed by E. Anthony & Sons, Inc." (Case 1-R-2310).

It was not until petitioner's counsel appeared at the office of the Regional Director in Boston on February 23, 1945, that petitioner learned the American Newspaper Guild had stepped into the picture. The Regional Director, in accordance with the practice of his office, had notified the Guild of the dispute between the Kramer-Cooper organizations and petitioner on February 8 when he summoned petitioner to appear at his office on February 13 for a conference concerning the representation proceedings initiated by Kramer and Cooper. The Regional Director also notified the Teamsters' Union, with which petitioner had a contract covering drivers and helpers engaged in the delivery of petitioner's newspapers.

At the conference in Boston petitioner herein, the Kramer-Cooper Associations, the Newspaper Guild, the Teamsters' Union and the Board all participated through their representatives. At that conference Cooper, representing his groups, admitted he and Kramer had set up the Associations while still in petitioner's employ, whereupon the Regional Director of the Board informed him it was his obligation to withdraw the petitions for designation of representatives for bargaining, the filing of which had occasioned the conference, or the Regional Director would reject them. Subsequently, but not for some time, these petitions were withdrawn as were also charges of unfair labor practices made against petitioner by the Kramer-Cooper Associations. The Guild, having meanwhile taken over, substituted itself as the petitioning group for representation and the charging party in respect of the alleged unfair labor practices.

On August 25, 1945, the Board through its Regional Director at Boston issued a complaint against E. Anthony & Sons, Inc., alleging that petitioner in the course of its business had violated Sections 8 (1) and (3) of the National Labor Relations Act (hereinafter called the Act).

The complaint alleged that petitioner had discharged and at all times since their discharge had refused to reinstate seven employees (R. 262, 263).

The complaint further alleged that petitioner discharged the employees named therein "for the reason that they joined or assisted the Association and/or the Union and engaged in other concerted activities for the purposes of collective bargaining or other mutual aid or protection" (R. 263).

Then the complaint alleged that petitioner during the period beginning on or about January 1, 1945, and continuing to and including the date of the complaint (August 25, 1945) had interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On August 31, 1945, petitioner filed its answer (R. 266-7). Therein it admitted that certain of its activities, alleged in the complaint for the purpose of sustaining the Board's jurisdiction affected commerce.

In its answer petitioner denied that it had been engaged in or was still engaging in any of the unfair labor practices alleged in the complaint. Hearing was held at New Bedford, Massachusetts, on October 22, 23 and 24, 1945, before Robert M. Gates, Trial Examiner of the National Labor Relations Board. Petitioner was represented by counsel as was the American Newspaper Guild and the Board. The Newspaper and Radio Workers' Protective Association of Southeastern Massachusetts was not represented by counsel and did not participate in the hearing.

When this case came on for hearing before the Trial Examiner of the Board, petitioner called upon counsel for the National Labor Relations Board who appeared as the representative of the Board to produce at the hearing for use therein the files of the First Region's office in reference to Cases Nos. 1-R-2296, 1-R-2310 and 1-C-2512 including any memoranda or reports concerning interviews with Max Kramer or William H. Cooper; any representations made by them to the Board's representatives; any order of disposition of the foregoing entitled cases together with any memoranda pertaining to any withdrawal by petitioners or

charging parties in the foregoing cases. Petitioner also called upon the Board's representative to produce correspondence or any other material or memoranda bearing upon the entry of the American Newspaper Guild in this controversy wherein the American Newspaper Guild took over from the Newspaper and Radio Workers' Protective Association its list of members in New Bedford and substituted itself as the charging party in the proceedings resulting in the issuance of the complaint herein. Petitioner requested further information from the Board including its complete files concerning the representations of the Guild and the investigations made by the Board's representatives, etc., in reference to this case, and the complete files in Case No 1-C-2517 concerning the withdrawal of the charges filed by Ellison in that case if they were withdrawn and the substitution of the American Newspaper Guild as the charging party in his behalf. In the same request petitioner asked the Board to produce Dr. A. Howard Myers, former Regional Director of the National Labor Relations Board, First Region, to testify in this proceeding.

Petitioner's request was denied in toto by counsel for the Board, whereupon petitioner requested the Trial Examiner to issue a subpoena for Dr. Myers and to compel the production of the material requested in counsel's letter. Both requests were denied by the Trial Examiner (R. 255).[3]

The Trial Examiner in his report found petitioner guilty of violating Section 8 (1) of the Act and recommended that the Board issue an order directing petitioner to cease and desist from further violations.

The Trial Examiner also found petitioner guilty of violating Section 8 (3) of the Act, holding that petitioner had discharged the seven employees for union activities. He recommended that all seven be made whole for any loss of pay and that five of the seven be offered reinstatement. He stated as his reason for failing to recommend the reinstate-

[3] The record shows Dr. Myers refused to appear and testify except under subpoena (R. 251).

ment of the other two—Harden and Ellison—that neither desired reemployment by petitioner.[4]

Petitioner filed exceptions to the Trial Examiner's report and recommendations and requested oral argument before the Board.

Argument was heard May 9, 1946.

On August 26, 1946, the Board issued its decision and order in which it adopted the findings, conclusions and recommendations of the Trial Examiner with certain modifications and exceptions. Board Member Gerard D. Reilly dissented in an opinion which appears at page 64 of the Record.

On September 5, 1946, petitioner filed in the court below its petition to review and set aside the Board's order pursuant to Section 10 (f) of the Act (R. 2). On October 15, 1946, the Board filed its answer and requested enforcement of its order (R. 14).

On February 13, 1947, petitioner filed a motion in the court below to adduce additional evidence pursuant to Section 10 (e) of the Act. By its motion petitioner moved the court to enter its order directing the Board to

> "(1) permit petitioner to adduce before the Board or a member, agent, or agency thereof the evidence which petitioner was prevented from adducing by the rulings of the Trial Examiner described in Paragraph 19 hereof; and
>
> "(2) cause a subpoena to be issued directing Dr. A. Howard Myers, former Regional Director of the National Labor Relations Board, to appear and testify before said Board or a member, agent, or agency thereof,[5] and

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[4] The Examiner's recommendation which was upheld by the Board and by the court below ordered petitioner to reinstate Silveira, Thompson, Ainsworth and Simas notwithstanding the fact no one of the four affirmatively requested reinstatement while on the stand. Boff was the only discharged employee who sought reinstatement.

[5] At the hearing before the Trial Examiner counsel for petitioner made an offer of proof in the course of which he set forth his rea-

"(3) cause the Regional Director of the National Labor Relations Board for the First Region to produce the documents described in Paragraph 18 hereof before the said Board or a member, agent, or agency thereof; and

"(4) permit petitioner to introduce before the Board or a member, agent or agency thereof as additional evidence a certified copy of the indictment of the Grand Jury, a certified copy of the pleadings, indictment, transcript of testimony and docket entries in the case before the Superior Court for the Commonwealth of Massachusetts entitled 'No. 8622—Criminal. *Com-*

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sons for requesting the production of Board records and the subpoena for Dr. Myers (R. 250-255). The evidence petitioner sought to adduce would have shown that the persons involved in this proceeding filed five previous petitions and charges with the Board's Regional Director for the First Region in Cases Nos. 1-R-2296, 1-R-2310, 1-C-2512, 1-R-2351 and 1-C-2517 (R. 66-67, 251-252). Each petition and charge was withdrawn during March and April, 1945 (R. 67). The evidence petitioner sought to adduce would have shown the reasons for withdrawal in each proceeding and would have shown that at least two of the petitions were withdrawn at the direction of the Regional Director because of the circumstances surrounding the formation of the Kramer-Cooper Association (R. 250-255). Dr. Myers would have testified as to what Cooper told him concerning the activities of Kramer and Cooper whereby they sought to take over the circulation of petitioner's newspapers for their own personal ends while they were still executives in petitioner's employ (R. 250-255).

Dr. Myers would have testified further that his office notified the Guild of the petitions filed with the Board by Kramer and Cooper (R. 252, 254); that such notice was given on or before February 13, 1945 (R. 252); that when petitioner's counsel arrived at the Board's office in Boston on February 23, 1945, he was asked what reply petitioner had made to the Guild's demand that it be recognized as collective bargaining agent for petitioner's employees (R. 253); that petitioner had never received such a demand (R. 253); that upon investigation it developed that the Board had received a copy of the demand some days before petitioner did (R. 253); that the Guild knew that the Association was set up by Kramer and Cooper while they were still in petitioner's employ to serve their own personal ends (R. 253); and that the Guild further knew that the petitions filed by the Association were withdrawn at the direction of Dr. Myers because of the circumstances under which the Association was formed by Kramer and Cooper (R. 253).

monwealth v. *Max Kramer, William H. Cooper, and Mary J. Harden;*[6] and

"(5) permit petitioner to introduce before the Board or a member, agent or agency thereof as additional evidence a copy of the official record prepared for the Weather Bureau, Department of Commerce by its observer at New Bedford (the New Bedford Department of Public Works) showing the precipitation at New Bedford, Massachusetts, for the month of March, 1945;[7] and

"(6) make the additional evidence taken pursuant to the foregoing paragraphs (1) to (5), inclusive, of this prayer a part of the record in the proceeding

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[6] On January 16, 1947, Max Kramer and William H. Cooper pleaded guilty in the Superior Court of the Commonwealth of Massachusetts to an indictment of the Grand Jury charging that:

"Max Kramer, William H. Cooper, and Mary J. Harden being servants or agents of E. Anthony & Sons, Incorporated, did conspire together to engage in and conduct a business in competition with and in conflict with the interests of their said employer in violation of their respective duty to their said employer as said agents or servants" (R. 306).

The acts of Kramer and Cooper referred to in the indictment occurred for the most part prior to January 27, 1945, when Kramer was discharged by petitioner, and constituted an integral part of the scheme on the part of Kramer and Cooper to take over petitioner's business to serve their own personal ends.

Petitioner desired to have a certified copy of the indictment, pleading, transcript of testimony and docket entries in the proceeding entitled "Case No. 8622 Criminal—*Commonwealth* v. *Max Kramer, William H. Cooper and Mary J. Harden,*" before the Superior Court of the Commonwealth of Massachusetts made a part of the record in this proceeding. Petitioner was unable to adduce this evidence at the hearing before the Trial Examiner for the reason that the matter was not concluded until January 16 of this year.

[7] At the hearing Manuel Simas testified that there was no rain at New Bedford for the two weeks preceding his discharge on March 20, 1945 (R. 228). This testimony was credited by the Board (R. 36). The official records of the Weather Bureau, Department of Commerce, demonstrate that Simas' testimony was incorrect. The official records show that there was rain or snow on six days during this period and that on two other days there were dense fogs.

known upon the records of the Board as Case No. 1-C-2520, the title thereof being 'In the Matter of E. Anthony & Sons, Inc. and American Newspaper Guild C. I. O.'; and

"(7) file with this Court any modified or new findings which it may make by reason of the evidence so adduced and made a part of said record and its recommendations, if any, for the modification or setting aside of its order, or if it either shall not make any such modified or new findings or shall not have any such recommendations for the modification or setting aside of its order, or both, file with this Court a statement to that effect" (R. 308-309).

On June 23, 1947, the court below with Justice Clark dissenting denied petitioner's motion for leave to adduce additional evidence and granted the petition of the Board to enter a decree enforcing its order.

On July 8, 1947, the court below entered an order staying the issuance of a certified copy of its opinion and judgment to and including August 23, 1947, to permit application to this Court for the allowance of a writ of certiorari.

B.

Statement Disclosing Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C., Sec. 347 (a)), and Section 10 (e) and (f) of the Act. The decree of the United States Court of Appeals for the District of Columbia to be reviewed was entered on June 23, 1947 (R. 330).

The conclusions of the court below present for determination: (a) important questions of federal law which have not been, but should be settled by this Court and (b) a federal question decided by the court below in a way that is in conflict with an applicable decision of this Court.

C.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are set forth in Appendix A to this petition and brief.

D.

Questions Presented.

1. Whether an organization formed by two of an employer's chief executives to serve their own personal ends is entitled to the protection of the National Labor Relations Act.

2. Whether it is an unfair labor practice for an employer to discourage membership in an organization organized in violation of Section 8 (2) of the Act.

3. Whether it is an unfair labor practice to discharge an employee for activities in behalf of an organization which the employer is bound to disestablish.

4. Whether it is an unfair labor practice to exercise surveillance over an organization formed in violation of Section 8 (2) of the Act.

5. Whether it is an unfair labor practice for an employer to discharge persons for cause when the cause for discharge is discovered during the employer's inquiry into the method and manner by which an organization was formed in violation of Section 8 (2) of the Act.

6. Whether it is an unfair labor practice to discharge executives and supervisors who participated in the formation of an organization in violation of Section 8 (2) of the Act (Silveira, Ellison and Harden).

7. Whether it is an unfair labor practice to discharge an employee for urging independent contractors to join an or-

ganization organized in violation of law and concerning which the Board has made no findings (Thompson).

8. Whether there is substantial evidence in the record to support the finding that petitioner violated Section 8 (1) of the Act.

9. Whether there is substantial evidence in the record to support the finding that the seven persons whom the Board ordered made whole were discharged because of union activity.

10. Whether the Board and court below were justified in ordering the reinstatement of employees who did not ask for reinstatement.

11. What steps an employer may take to protect himself when two of his chief executives form an organization for the purpose of taking over the distribution of the employer's newspaper to serve their own personal ends and where their design is furthered by other executives and supervisors.

12. Whether the Board erred in upholding the Trial Examiner's refusal to issue a subpoena directing Dr. A. Howard Myers, former Regional Director of the National Labor Relations Board, to appear and testify.

13. Whether the Board erred in upholding the Trial Examiner's refusal to order the Board's attorney to produce certain papers from the files of the Board's Regional Office.

14. Whether the court below erred in denying petitioner's motion for leave to adduce additional evidence.

E.

Reasons Relied on for the Allowance of the Writ.

1. THE DECISION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IS IN CONFLICT WITH THE DECISION OF THIS COURT IN N. L. R. B. v. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO., 308 U. S. 241 (1939).

In the *Newport News* case this Court construed the Act to mean that organizations formed in violation of Section 8 (2) should not "be permitted to continue in force". In this case the Board not only permitted such an organization to continue in force but also gave it the same affirmative protection it affords to legally-constituted labor organizations.

Before the Board and also in the court below petitioner offered to show that the Kramer-Cooper Association was formed in violation of Section 8 (2) of the Act. A majority of the Board and of the court below refused to allow petitioner to make such a showing. By their decisions they not only permitted an illegal organization to continue in force but gave it encouragement and government sanction.

2. THE QUESTION IS HERE PRESENTED FOR THE FIRST TIME IN THIS COURT AS TO WHETHER AN ORGANIZATION MADE ILLEGAL BY SECTION 8 (2) OF THE ACT IS ENTITLED TO PROTECTION UNDER OTHER SECTIONS OF THE ACT.

This Court has never had occasion to consider the precise question presented by the factual situation herein.

The Board has consistently held that any inside organization of rank and file employees and supervisors, which has been formed by supervisory employees, is illegal under Section 8 (2) of the Act and is subject to disestablishment. *Matter of Brown Company,* 65 N. L. R. B. 208 (1946); *Matter of Newport News Shipbuilding & Dry Dock Company,* 8 N. L. R. B. 866 (1938), 101 F. 2d 841 (C. C. A. 4th, 1939), 308 U. S. 241 (1939); *Matter of American Smelting and Re-*

fining Company, 29 N. L. R. B. 360 (1941), 126 F. 2d 680 (C. C. A. 8th, 1942); *Matter of Gulf Public Service Company*, 18 N. L. R. B. 562 (1939), 116 F. 2d 852 (C. C. A. 5th, 1941). A majority of the Board and the court below held that an organization made illegal by Section 8 (2) was nevertheless entitled to the protection of Section 8 (1) and (3). Justice Clark and Board Member Gerard D. Reilly filed dissenting opinions (R. 64, 328) in which they demonstrated the unsoundness of holding that it is an unfair labor practice to discourage membership in an illegal organization.

3. THE QUESTION IS HERE PRESENTED FOR THE FIRST TIME IN THIS COURT AS TO WHETHER IT IS AN UNFAIR LABOR PRACTICE TO EXERCISE SURVEILLANCE OVER AN ORGANIZATION FORMED IN VIOLATION OF SECTION 8 (2) OF THE ACT.

This Court has never considered the question of whether it is an unfair labor practice for an employer to attempt to obtain information concerning an organization for which he is held responsible and which he is bound to disestablish. It is manifestly unfair to hold an employer responsible for the acts of his supervisors and at the same time deny him an opportunity to find out what those acts are.

4. AN IMPORTANT QUESTION IS PRESENTED TO THIS COURT AS TO THE STEPS AN EMPLOYER MAY TAKE WHEN TWO OF HIS CHIEF EXECUTIVES FORM AN ORGANIZATION FOR THE PURPOSE OF TAKING OVER THE DISTRIBUTION OF HIS NEWSPAPER TO SERVE THEIR OWN PERSONAL ENDS.

This Court has never passed upon the question presented by the specific facts of this case.

The organization involved herein was founded by two of petitioner's chief executives. The rank and file was organized by executives and supervisors. The officers of the Association and its successor, the Guild, were petitioner's executives and supervisors. Petitioner offered to show that the executives who set up the organization did so for the

purpose of forcing petitioner's employees under their direction and control into an organization to serve their personal ends. The court below held that these facts were immaterial. It thereby sanctioned coercion of the rank and file, and an attempt by dishonest executives to use the Act as a shield to protect them from the consequences of their dishonest acts.

5. AN IMPORTANT QUESTION IS PRESENTED AS TO THE VALIDITY OF THE ADMINISTRATIVE PROCEDURE HEREIN.

To illustrate, inter alia, the record is undisputed that William Thompson was discharged for activities in behalf of the "Newspaper Carriers' Association". The Trial Examiner failed to make findings with regard to this Association and petitioner excepted to his failure so to do (R. 47). The Board similarly failed to make such findings and petitioner objected to its failure in the court below (R. 8, 10).

The finding that Thompson was discharged for union activity cannot stand in the absence of a finding that the Newspaper Carriers' Association was a "labor organization" within the meaning of Section 2 (5) of the Act. The Board refused to make such a finding. On the record in this case it could not do so.

BECAUSE OF THE CONFLICT WITH THE NEWPORT NEWS SHIPBUILDING CASE AND THE NOVEL ISSUES PRESENTED THIS COURT SHOULD REVIEW THE ORDER OF THE COURT BELOW.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Court of Appeals enforcing the Board's order be reversed by this

Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

The opinions below, the statement of the matter involved, jurisdiction, and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

Summary of Argument.

Point 1. The history of this case demonstrates that the decision of the Board was in conflict with other decisions of the Board holding that organizations formed by executives and supervisory employees are not entitled to the pro-

tection of the Act and that the decision of the court below upholding the Board's decision and order was in coflict with the decision of this Court in *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241 (1939).

Point 2. In effect, by its decision the court below has given legality to an organization admittedly formed in violation of the Act and extended the protection of the Act to employees who knowingly participated in the illegal forming of the organization. The organization involved herein was illegal and should not receive the protection and assistance afforded by the decree of the court below.

Point 3. Petitioner has been found guilty of an unfair labor practice because it exercised surveillance over the Kramer-Cooper Association. The record is clear there was no surveillance over the Guild after petitioner was informed by the Regional Director on February 23 it had entered the picture. So the question as to the propriety of surveillance over the successor to an illegally formed organization is not at issue herein. In effect the Board and the court below have said that employers have no right to seek information concerning an organization for which they are held responsible and which they are under a duty to disestablish. There is nothing in the Act to authorize or permit such an anomaly.

Point 4. In this case two top executives who later pleaded guilty to conspiring against petitioner sought to tie petitioner's hands by organizing its circulation department. The court below held that it was an unfair labor practice to interfere with such an organization. It thereby permitted the Act to be used as an instrument of coercion and gave protection to an organization formed pursuant to a criminal conspiracy. The Act was never designed to protect such an organization.

Point 5. This Court should exercise its jurisdiction in order to examine the important questions of administrative procedure raised herein. Thompson was discharged for ac-

tivities on behalf of an organization concerning which the Board refused to make findings. The court below held that evidence was properly excluded by the Trial Examiner because it was hearsay despite the facts that (a) this ground was not suggested when the case was before the Board, (b) cases before the Board are not governed by the ordinary rules of evidence and (c) the Board has repeatedly admitted hearsay evidence and based its findings on such evidence.

III.

ARGUMENT.

Point 1.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN N. L. R. B. v. NEWPORT NEWS SHIPBUILDING & DRY DOCK CO., 308 U. S. 241 (1939).

In the *Newport News* case this Court held that the Act precludes recognition of organizations formed in violation of Section 8 (2). In this case the court below not only recognized such an organization but gave it affirmative aid and protection. A direct conflict is thus presented which should be resolved by this Court.

Point 2.

THE COURT BELOW ERRED IN RECOGNIZING AN ORGANIZATION FORMED IN VIOLATION OF THE ACT AND IN EXTENDING THE PROTECTION OF THE ACT TO EMPLOYEES WHO KNOWINGLY PARTICIPATED IN THE ILLEGAL FORMING OF THE ORGANIZATION.

The record is indisputable that two of petitioner's top executives formed two organizations to serve their own ends; that they were aided and abetted in their creation by supervisory employees under their immediate supervision and control; that when their demands for recognition as the representatives for collective bargaining were ignored by petitioner they filed petitions for designation as bargaining representative with the Regional Director of the Board;

that upon the discharge of certain of the persons herein they filed charges with the Board; that they assured the Regional Director of the Board of the bona fides of the organizations; that thereafter the Regional Director discovered the true character of the organizations; that Cooper admitted his part in organizing the Associations before he resigned as petitioner's circulation director; that thereupon the Regional Director gave Cooper the alternative of withdrawing the petitions or having them dismissed; and that the petitions were withdrawn.

Prior to the withdrawal of the petitions, the main Kramer-Cooper organizaion was turned over lock, stock and barrel to the Newspaper Guild, which thereafter demanded recognition as bargaining agent and substituted itself as the charging party in respect of the charges of unfair labor practices upon which the complaint involved herein was issued.

The Kramer-Cooper Associations were illegal because they were conceived by two top executives in furtherance of a criminal conspiracy and also by reason of the fact supervisors were used to line up the rank and file employees and to cause independent contractors to violate their contracts with petitioners.

Prior to its decision in this case, the Board had uniformly held that any inside organization of rank and file employees, which had been formed by supervisory employees, was illegal under Section 8 (2) of the Act and was subject to disestablishment irrespective of whether the activities of the supervisors had been instigated or ratified by higher management.

Matter of Brown Company, 65 N. L. R. B. 208 (1946);

Matter of Newport News Shipbuilding & Dry Dock Company, 8 N. L. R. B. 866 (1938), 101 F. 2d 841 (C. C. A. 4th, 1939), 308 U. S. 241 (1939).

And see dissenting opinion of Board member Gerard D. Reilly in this case (R. 65).

As the *Brown* case demonstrates, organizations were found to be illegal where there was far less taint of supervisory activity than was present here. Indeed it would be difficult to conceive of a case in which supervisory employees played a more important part than they did in this case. The organization involved herein was formed by two executives; the rank and file were organized by supervisors; each of the officers was an executive or a supervisor. Never before has such an organization been recognized.

The Kramer-Cooper Association was formed in violation of Section 8 (2) of the Act, was subject to disestablishment, was illegal and should not be recognized for any purpose. The court below erred in recognizing such an organization and in ordering reinstatement of supervisors who "organized" the rank and file. This Court should exercise its jurisdiction in order to examine the question of whether an organization outlawed by one subsection of the Act can be recognized and given protection under the subsections immediately preceding and following. This Court should examine the further question as to whether the Board may order reinstatement of supervisors who have organized their subordinates in violation of the Act.

Point 3.

THE COURT BELOW ERRED IN HOLDING THAT PETITIONER HAD NO RIGHT TO EXERCISE SURVEILLANCE OVER AN ORGANIZATION FOR WHICH THE ACT HELD PETITIONER RESPONSIBLE AND WHICH PETITIONER WAS BOUND TO DISESTABLISH.

The Board and the court below have found petitioner guilty of an unfair labor practice because Jeremiah J. Kelleher, petitioner's circulation manager, sat in his car and "watched those attending" one meeting of the Association (R. 24, 324). There is no evidence that petitioner exercised surveillance over the Guild, and so the question of the propriety of surveillance over the successor of an illegally-formed organization is not at issue. The question pre-

sented here relates solely to surveillance over the illegally-formed organization itself.

When two of petitioner's top executives organized the Kramer-Cooper Associations and when organization of the rank and file was carried on through supervisors, petitioner became responsible for the acts of its supervisory employees.[1] It is manifestly unfair to hold an employer liable for the acts of his supervisory employees without giving him an opportunity to find out what those acts are. This Court should exercise its jurisdiction to determine whether the Board may apply the doctrine of respondeat superior in order to find employers guilty of unfair labor practices and at the same time deprive employers of their right to investigate those acts for which they are held liable.

Point 4.

THE ORGANIZATION INVOLVED HEREIN WAS NOT A BONA FIDE "LABOR ORGANIZATION." RATHER IT WAS AN INTEGRAL PART OF A CRIMINAL CONSPIRACY DIRECTED AGAINST PETITIONER AND WAS FORMED BY KRAMER AND COOPER TO SERVE THEIR OWN PERSONAL ENDS.

During 1939 and again during 1944 Max Kramer, petitioner's general business manager, and William H. Cooper, its circulation director, took over a portion of petitioner's business without petitioner's knowledge and realized a profit of several thousands of dollars therefrom. These

[1] In *N. L. R. B.* v. *Christian Board of Publication*, 113 F. 2d. 678 (C. C. A. 8th, 1940) the court said:

> "The respondent must be held responsible for the acts of its supervisory employees even though those employees may be included in an appropriate unit for collective bargaining. If it were otherwise an employer could freely influence his employees' freedom of choice by this means yet claim immunity. As between respondent and its foremen the doctrine of respondeat superior applies and the responsibilities of that relationship are not suspended merely because the foremen chance to be included within the appropriate unit for collective bargaining" (113 F. 2d at page 682).

facts were reported to the Grand Jury which returned an indictment charging Kramer and Cooper with criminal conspiracy. On January 16, 1947, Kramer and Cooper pleaded guilty to the Grand Jury's indictment.

Prior to the time that petitioner learned of the conspiracy directed against it Kramer and Cooper sought to further their conspiracy through the organization of petitioner's circulation department. They set up the Newspaper and Radio Workers' Protective Association with Kramer as President and Cooper as Business Agent in order to gain control over petitioner's circulation. The formation of the Association was an integral part of a criminal conspiracy and was itself therefore a criminal act.

The Association was not a bona fide labor organization. Rather it was the alter ego of two dishonest executives and was created by them in an attempt to tie petitioner's hands.

The Act was never designed as a shield for criminal acts. This Court should exercise its jurisdiction to determine whether the Act forbids interference with an organization formed by two admittedly dishonest executives for the purpose of obtaining a stranglehold over an employer's business and to avoid punishment for other crimes.

Point 5.

THIS COURT SHOULD EXERCISE ITS JURISDICTION IN ORDER TO EXAMINE THE IMPORTANT QUESTIONS OF ADMINISTRATIVE PROCEDURE RAISED HEREIN.

At the hearing petitioner asked for a subpoena directing Dr. Myers, a former Regional Director of the National Labor Relations Board, to appear and testify. This request was denied by the Trial Examiner (R. 255). No objection was made to petitioner's request, and it is evident that it was denied because the Trial Examiner considered Dr. Myers' testimony immaterial (R. 254).

In his Intermediate Report the Trial Examiner made no mention of petitioner's request (R. 20-45). In its decision the Board ruled that petitioner's request was properly de-

nied since Dr. Myers' testimony was immaterial (R. 61-62) and in a footnote stated that the Trial Examiner's refusal to issue a subpoena was proper since Dr. Myers' testimony was not the most direct evidence (R. 62).

Before the court below the Board took a new approach and argued that the Trial Examiner's refusal to issue a subpoena was proper since Dr. Myers' testimony would have been hearsay. The court below adopted this view (R. 327).

The rules of evidence prevailing in courts of law or equity are not controlling in proceedings before the Board (Section 10 (b) of the Act). The Board has repeatedly accepted and based its decisions on evidence which was not the most direct evidence. The Board has repeatedly accepted and based its decisions on hearsay evidence.

In the light of these facts, fundamental fairness requires that the Board advise a party at the hearing when it invokes the best evidence rule in order to give litigants an opportunity to comply with requirements not ordinarily imposed. This same fundamental fairness which is the foundation of procedural due process requires the Board to advise a party in advance whenever it deviates from its normal procedure and imposes the hearsay rule.

This case presents a closely-related and equally-important question as to whether administrative due process permits the Board to apply one set of standards to the evidence which it adduces and another to the evidence adduced by others. In this case many of the Board's findings are based on hearsay evidence; yet evidence which petitioner sought to introduce has been held properly excluded because of its allegedly hearsay nature.

Another question of procedural due process is raised by that portion of the Board's order which requires Thompson's reinstatement. Thompson was discharged for activities on behalf of the Newspaper Carriers' Association. The Trial Examiner made no findings with regard to this organization and petitioner excepted to his failure so to do

(R. 47). Thereafter the Board failed to make any such findings.[2]

The finding that Thompson was discharged for union activity cannot stand in the absence of a finding that the Newspaper Carriers' Association was a "labor organization" within the meaning of Section 2 (5) of the Act.[3] The

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[2] The court below was evidently confused by the failure of the Board to make any finding concerning the Newspaper Carriers' Association. It stated in its opinion "That same day (February 14th) Ellison was given a letter, stating that he was discharged for inducing carriers to break their contracts with the company, collecting money for which no accounting was made, and participating in outside business activities on company time. The reference to inducing carriers to break their contracts was to Ellison's activity in getting members for the union" (R. 323). It also stated "On February 15th, Thompson was discharged with a letter stating that the reason was 'soliciting carrier boys to break their contracts', which referred to his activity in asking the boys to sign applications to join the union" (R. 323). The union involved herein was the Newspaper Guild. There is no evidence in the record whatsoever that respondent ever mentioned the Newspaper Guild to Ellison or Thompson, both of whom were discharged before the Guild entered the picture or respondent learned that it had entered the picture. The only organization that Ellison and Thompson ever asked carrier boys to join was the Newspaper Carriers Association concerning which the Board refused to make findings.

The court below also erred when it said "Thompson testified that he had never urged any carrier to break his contract with the Company; no contradictory testimony on that point was presented" (R. 323). Thompson testified he had urged carrier boys to joint the Newspaper Carriers' Association (R. 204). The record shows that the carriers went on strike and refused to deliver petitioner's newspaper (R. 228-231), thereby breaking their contracts with petitioner (R. 288). Board witness Simas testified that during the strike one of the carriers said to him, "See what we have done. We have busted that down; we have busted half of this railing; we busted a place on the wall; we busted some windows" (R. 230).

Prior to the issuance of the complaint the Superior Court of Massachusetts had enjoined Kramer, Cooper and their agents from interfering with the carrier boys' contracts with petitioner (R. 294). Thompson was one of the agents.

[3] The court below in its opinion referred to the fact that officials of petitioner in a conversation with Thompson had informed him that the organizers of the union were "a bunch of racketeers" (R. 323). Kramer and Cooper, the principal organizers, pleaded

Board refused to make such a finding. On the record in this case it could not do so.[4]

And still another question of due process is raised by that portion of the Board's order which requires that Silveira be reinstated and made whole, notwithstanding Silveira did not request reinstatement,[5] and that Ellison, who testified he did not want reinstatement, be made whole. In the course of its inquiry into the activities of these two supervisory employees in connection with the formation of the Kramer-Cooper organizations petitioner learned they had used their positions to compel newspaper boys to kick in part of their earnings to what Silveira and Ellison chose to call a "kitty." Neither had ever made any accounting of such funds and used them to cover upon their slipshod methods of handling petitioner's business. Upon learning of their practices, petitioner discharged Silveira and Ellison forthwith and offered to make whole any newspaper boy from whom they extracted money for their "kitties." The Board said petitioner should have condoned their offenses and ordered them made whole on the finding they were discharged for their work in forming the Association. The court below sustained the Board.

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guilty to an indictment charging them with conspiring to conduct a business in competition with their employer in violation of their duties to their employer (R. 306).

[4] The acts for which Thompson was discharged were not within the protection of the Act since the Carriers' Association was not a "labor organization" within the meaning of Section 2 (5) of the Act and since the carrier boys were not employees but independent contractors. Even if the carrier boys had been employees, Thompson's conduct in urging them to join the Carriers' Association would have justified his discharge since such conduct would have been a clear violation of Section 8 (2) of the Act.

[5] At the hearing Silveria testified that he was working for a newspaper in Waterbury, Connecticut (R. 113); that he was back in the work he liked (R. 114); and that he did not want his job back (R. 112). Petitioner has been ordered to reinstate Silveira, Thompson, Ainsworth and Simas, notwithstanding the fact that no one of the four requested reinstatement. Boff was the only discharged employee who sought reinstatement.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 21, 1947.

APPENDIX A.

Excerpts from the National Labor Relations Act (Act of July 5, 1935, C. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151, et seq.).

SEC. 2. When used in this Act—

* * * * * * * * * *

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer——

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: PROVIDED, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to

require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * * * * * *

SEC. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon all the testimony taken, the Board shall be of the

opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed,

and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

APPENDIX B.

COMMONWEALTH OF MASSACHUSETTS

Bristol, ss. Superior Court
No. 3217 Eq.

E. ANTHONY & SONS, INC.

v.

MAX KRAMER ET AL.

Findings, Rulings and Order for Decree.

In the pleadings the following facts are admitted:

The plaintiff is a Massachusetts corporation, with a principal place of business in New Bedford, engaged in the business of publishing a daily and a Sunday newspaper called New Bedford Standard-Times, in New Bedford, and the circulation of said paper in New Bedford and in the surrounding communities. The plaintiff also publishes a daily newspaper called Cape Cod Standard-Times in Hyannis, in the town of Barnstable, and circulates said paper on Cape Cod and in the surrounding communities.

The defendant Kramer and the defendant Cooper are residents of New Bedford. The defendant Cooper claims to be the business representative of the defendant The Newspaper & Radio Workers Protective Association of Southeastern Massachusetts, and also of the defendant The Newspaper Carriers Association.

The first of these defendant associations is an unincorporated labor organization. The second, the Carriers Association, is an unincorporated organization, and is an auxiliary of the first named association.

Prior to January 26, 1945, when his employment was terminated, Kramer was for many years the General Business Manager of the plaintiff, and during the many years he was so engaged he had supervision of and directed the making of certain contracts with carrier boys for the circulation of the daily and Sunday papers published by the plaintiff. A sample copy of said carrier boy contract is attached to the Bill and marked therein "Exhibit A."

Cooper was circulation director of the plaintiff, and resigned as such on February 1, 1945. In that capacity he caused contracts (such as Exhibit A aforesaid) with carrier

boys to be executed by and with the plaintiff. These contracts as of the date of the Bill were in full force and effect to the knowledge of Cooper. In the course of its business, the plaintiff is required, expeditiously and without interference, to cause its newspapers to be delivered. To satisfy this requirement, the plaintiff has established stations where district managers supervise the delivery of the plaintiff's newspapers to carrier boys.

Cooper admitted that he invited the carrier boys to join the Carriers Association, (although contending he did so only after he had terminated his employment with the plaintiff). Cooper admitted that he sent to the parents of the carrier boys a letter, of which a copy is attached to the Bill and marked therein "Exhibit C." Cooper admitted that on February 10, 1945, he sent to the plaintiff a letter, a copy of which is attached to the Bill and marked therein "Exhibit D," enclosing in said letter the draft of a proposed contract between the plaintiff and the Carriers Association, a copy of which is attached to the Bill and marked therein "Exhibit E."

At the trial before me, it was orally stipulated by the parties that the carrier boys were called to a meeting of the Carriers Association (at which meeting they were solicited to join the Association), and there they were told that by joining this Association they would be able to secure increased compensation for their deliveries, as well as other benefits.

In addition to the foregoing, I find the following facts, and make the following rulings:

The "carrier boys," numbering approximately 900, who had signed contracts, such as "Exhibit A" aforesaid, with the plaintiff, were not only minors but were in fact schoolboys making customary home deliveries of newspapers.

While Kramer and Cooper were engaged as executive employees of the plaintiff as aforesaid, and in violation of the trust and confidence reposed in them by their employment, and with the intention of injuries (sic) and damaging the plaintiff, they conspired together to bring about the organization of the said Carriers Association (in addition to the other defendant association) and to invite and urge the carrier boys to breach their contracts with the plaintiff. Whatever was done by either Kramer or Cooper in the furtherance of this conspiracy was done with the full knowledge and consent of the other.

Among the things accomplished in the furtherance of the conspiracy was the instruction of the District Managers (who were employees of the plaintiff and under the immediate supervision of Cooper during his employment as circulation director) to urge the carrier boys to sign up as members of the Carriers Association, and generally to give the carrier boys and their parents such information as is suggested in the contents of "Exhibit B" attached to the Bill and made a part thereof.

Likewise, in furtherance of said conspiracy, the individual defendants on or about February 8, 1945, directed the said District Managers to cause the carrier boys to attend a meeting whereat the individual defendants, or either of them in the presence and with the full consent of the other, urged and solicited the carrier boys to breach their contracts with the plaintiff.

Likewise, in furtherance of said conspiracy, the individual defendants caused to be sent to the parents of the carrier boys prior to said meeting of February 8, 1945, a communication, a copy of which is attached to the Bill and marked therein "Exhibit C". The statement therein contained that the "boys have formed an association and we are happy that your son is one of more than 800 members" was false. At that meeting the individual defendants, or one of them in the presence and with the full consent of the other, orally directed carrier boys who were present (approximately three hundred in number) to disregard entirely and pay no attention to their contracts with the plaintiff, or to any orders given by the publisher of the plaintiff's newspapers or his representatives.

All things admitted in the pleadings by Cooper as aforesaid were done with the knowledge and consent of Kramer, and in pursuance of said conspiracy.

The individual defendants in their respective capacities as confidential employees of the plaintiff as heretofore described and identified had access to and possession of confidential papers, files and documents of the plaintiff, which papers, files and documents are more specifically described in the Bills of Particulars furnished in this suit to each of the individual defendants.

As each of said defendants severed his employment with the plaintiff, he removed said confidential papers, files and documents from the office of the plaintiff and retained them for some period of time to his own use. Although there

may be a presumption that the existence of these papers, having been once established as being in the possession of the individual defendants after the severance of their employment relationship with the plaintiff, continued for some period of time. I am unable to draw a reasonable inference that that state or condition of things has remained unchanged even until the time of trial, in the absence of evidence. Whether the said confidential papers, files and documents were destroyed by the individual defendants, or whether they were destroyed after copies of their material contents were made by said defendants, I am unable to determine in the absence of evidence. However, I am not precluded from finding, which I do, that the confidential information contained in said papers, files and documents is in the minds of these defendants for whatever use they may see fit to make of it, contrary to the implied contract with the plaintiff that they shall not use such information gained during the period of their employment with the plaintiff to the detriment of the plaintiff, unless they are enjoined from so doing.

Cooper resigned from his aforesaid employment with the plaintiff by a telegram sent on the night of February 1, 1945. This telegram did not come into the possession of either the publisher or the assistant publisher of the plaintiff's New Bedford newspaper until the morning of February 2, 1945, and then only about three or four hours before said publisher or his assistant received the communication signed by Cooper which was introduced in evidence and marked "Exhibit 2" and is incorporated herein by reference.

I rule that this is not a controversy arising out of or involving a labor dispute within the meaning of General Laws, Chap. 214, Sec. 9A.

The prayer for damages contained in the Bill was waived in open Court by the plaintiff.

It is ordered that a decree be entered permanently enjoining the defendants Kramer and Cooper, individually, or as representatives or officers or members of either of the defendant associations, or by their agents, servants or attorneys, from interfering with or seeking to bring about a breach of any contract between the plaintiff and any carrier boy, or any renewal thereof, which was in existence at the time that either of said individual defendants termi-

nated his employment with the plaintiff; and further enjoining the same from disclosing to any one except the plaintiff, its agents, servants, or attorneys, or otherwise using any confidential information gained by such individual defendants in the employment of the plaintiff or contained in any of the confidential papers, files and documents which I have found to have been taken from the possession of the plaintiff by said individual defendants at the time they terminated their employment.

JOSEPH L. HURLEY,
Justice of the Superior Court.

A true copy.
Attest:
/s/ CHARLES E. HARRINGTON,
Clerk.

OPPOSITION

BRIEF

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 286

E. ANTHONY & SONS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below (R. 320–329) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 56–68, 20–46) are reported in 70 N. L. R. B. 717.

JURISDICTION

The decree of the court below (R. 330) was entered on June 23, 1947. The petition for a writ of certiorari was filed on August 21, 1947. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the

Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board's findings that petitioner engaged in interference, restraint and coercion, and discharged seven employees for the purpose of discouraging union membership and self-organizational activity among its employees, are supported by substantial evidence.

2. Whether the fact that supervisory employees had assisted in the formation of a labor organization composed of both supervisory and nonsupervisory employees, precluded the Board from finding that petitioner's conduct in interfering with such labor organization and discharging employees for membership therein violated Section 8 (1) and (3) of the Act.

3. Whether the Board properly refused to issue a subpoena or order the production of papers as requested by petitioner for the purpose of showing that its supervisors had assisted in the formation of a labor organization, when the issue before the Board was whether petitioner had violated Section 8 (1) and (3) of the Act by interfering with such labor organization and discharging employees for membership therein.

4. Whether the court below erred in denying petitioner's motion for leave to adduce as additional evidence the foregoing evidence which peti-

tioner had been unable to produce before the Board.

The following questions urged by petitioner are, we submit, not presented in this case:

5. Whether it is an unfair labor practice for an employer to discharge employees for cause when the cause for discharge is discovered during the employer's inquiry into the method and manner in which a labor organization illegally assisted by supervisory employees was formed.

6. Whether it is an unfair labor practice to discharge an employee for urging independent contractors to join the Newspaper Carriers Association, an organization concerning which the Board has made no findings.

7. Whether the Board could properly order the reinstatement of employees who did not request reinstatement.[1]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 28–30.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on August 26, 1946, issued its findings of fact, conclusions of law, and order (R. 56–68, 20–46). The facts as found by the Board and as shown by the evidence, so far as

[1] Petitioner's question numbered 11 (Pet. 15) is a mere request for advice and presents no justiciable issue.

material to the issues here presented, may be summarized as follows:[2]

Petitioner publishes two newspapers, the New Bedford Standard-Times at New Bedford, Massachusetts, and the Cape Cod Standard-Times at Hyannis, Massachusetts (R. 21–22; 68). Prior to January 27, 1945, Max Kramer had been petitioner's business manager (R. 22; 85, 249, 281). He was discharged on that day (R. 22; 128–129, 249, 281). Immediately following his discharge he began signing petitioner's employees into membership in an organization to be known as the Newspaper and Radio Worker's Protective Association of Southeastern Massachusetts, herein called the Association (R. 22, 57; 128–129, 272). Mary J. Harden, secretary of William H. Cooper, petitioner's circulation manager, signed a card on January 27 and participated in distributing cards to other employees (R. 26, 57; 127–129, 272). The first meeting of the Association was held on February 1, 1945 (R. 22; 129–131). A few minutes before the meeting began, Cooper notified petitioner by telegram that he was resigning from his job as circulation manager (R. 22–23; 84–86, 131, 270). Officers were elected at this meeting, Kramer becoming president, John Silveira, vice president, Harden, secretary and Cooper,

[2] In the following statement references preceding the semicolons are to the Board's findings; succeeding references are to the supporting evidence.

business agent and treasurer (R. 23; 83, 130). Petitioner discharged Silveira and Harden on February 13 (R. 23, 25, 26–27; 79, 133, 136, 273). On this or the following day, it also discharged Sylvester Boff who had signed a membership card in the Association on February 13 (R. 23, 27–28; 189–192). On February 14, petitioner discharged Edmund B. Ellison, another active Association member (R. 23, 28–29; 152–154, 163–164, 275, 277) and on February 15, it discharged William Thompson (R. 23, 30; 200–203). At a meeting on February 18, 1945, the employees voted to dissolve the Association and to join the American Newspaper Guild (R. 23; 100–103, 137–139). Neither Kramer nor Cooper were admitted to membership in the Guild because they were no longer "working newspapermen" (R. 23; 71–72). On February 21, petitioner discharged Bilsborrow Ainsworth and on March 20, it discharged Manuel Simas, both of whom had joined the Association, attended its meetings and thereafter transferred their membership to the Guild (R. 23, 30–31, 39; 211–212, 215–216, 224, 227–228, 280).

Petitioner made known its opposition to these organizational activities from their outset. Petitioner's business manager, Nicholas J. Mahoney, told one of its truck drivers, Stanislaus Paczewicz, at the time he was hired in January, that "Someone is trying to organize a union * * * just watch your step" (R. 23; 121–122). Before the

Association's meeting on February 18, Mahoney told Paczewicz, "I don't expect to see you at the meeting tomorrow" and that one of the reasons he had hired Paczewicz was to stay out of the "Union" (R. 23–24, 59; 122–123, 125). The Association meeting referred to was kept under surveillance by petitioner's circulation manager, Jeremiah J. Kelleher, who sat in a car parked a few feet from the entrance to the meeting place and remained there for an hour and a half (R. 24, 38; 100–101, 123–124, 212–213, 224–225). When Paczewicz arrived, Kelleher told him, "I don't want you to go up there' (R. 24, 59; 124). He asked Paczewicz to get into his car and there attempted, unsuccessfully, to persuade Paczewicz not to go to the meeting (R. 24; 124).

Mahoney and other management officials questioned several employees about their organizational activities (R. 26, 27, 28, 30, 33; 132, 156, 189, 203), asking one what his sympathies were toward the union (R. 30; 203). One employee was told that his future was being jeopardized by joining a union (R. 29; 156). Mahoney told Simas that "we were afraid of you because you belong to the Guild" (R. 31; 226). He asked Harden, "Just as a matter of curiosity, what does an intelligent girl like you expect to get out of a union?" (R. 26; 132), and later told her, in a "threatening manner" that "You are on that side of the fence and I am on this side" (R. 26; 133).

The organizers of the Association were described as a "couple of gangsters" and a "bunch of racketeers" (R. 27, 30; 189, 203). Finally, when Silveira returned to the office after his discharge to discuss it with Mahoney, Mahoney asked him to "break away from * * * the Union" (R. 25; 94–95).

John Silveira began working for petitioner in 1930 or 1931 (R. 24–25; 78–79). For the last several years of his employment, he was city circulation manager (R. 24; 78). He joined the Association on January 27, 1945, and on February 1 became vice president (R. 23–24; 80, 81, 83, 139). On the morning following his election, Silveira was called into the office by Mahoney, who interrogated him concerning the Union, warned that he was making a mistake, that he should look out for himself rather than think about others, and that he had a good job and should stick to it (R. 25; 85–86, 91). A day or two later Mahoney asked Silveira about the operation of his "kitty," a petty cash fund used by a number of petitioner's employees to facilitate adjustments for losses caused by carriers, and Silveira gave the requested explanation (R. 25; 88–89).[3] On

[3] The "kitty" was a petty-cash fund obtained by withholding from the newsboy carriers during their first week of employment the difference between the commission rate on the newspapers sold and the amount paid the carrier during his first week of employment when carriers were paid a flat rate instead of a commission. The money thus obtained was

February 5, Silveira's job was assigned to another employee, and he was left with almost no duties to perform (R. 25; 89–91). About a week later, on February 13, Silveira was discharged without warning; the letter of discharge stated that his employment was terminated because he had conducted a "kitty" without the petitioner's knowledge or consent, that the "kitty" was a "shakedown" and his explanation of it a "plain subterfuge" (R. 25; 90, 92–93, 270). When Silveira protested, petitioner exonerated him of all charges of dishonesty, but he was not reinstated (R. 25–26; 95–96, 112). At the hearing, petitioner submitted no evidence to substantiate its charges. The evidence shows that Silveira's supervisors had originally approved the establishment of the "kitty," that not only did all of the branch and district managers and carriers know about the kitty, but petitioner's own books of account reflected its operation (R. 32, 60; 88, 89, 98–99, 105, 107–108, 111). Moreover, petitioner did not discharge three other district managers who also maintained "kitties" (R. 60; 160–161). On the day following Silveira's discharge, petitioner's Business Man-

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used to pay for losses incurred when carriers quit without paying for newspapers delivered to, and paid for, by customers, for windows broken by carriers, and for other similar activities (R. 25 n. 6; 87–89, 97–9, 105–112, 116, 160, 173–176, 183, 163, 276). The "kitty" money was used for petitioner's exclusive benefit (R. 32–33; 88–89, 94, 98–99, 110–111, 163, 276).

ager Gaylord told Ellison, "We got rid of two members of the union this morning, John Silveira, who was vice president, and Mary Harden, who was secretary" (R. 167).

Mary J. Harden, head bookkeeper and secretary to Cooper, petitioner's circulation director, was discharged without notice on February 13, 1945 (R. 27; 136, 273) after more than 13 years of continuous service (R. 26; 127, 137). Prior to joining the Association, Harden's work had frequently been praised by petitioner's executives (R. 26; 137). Shortly before her discharge, Harden had been elected secretary of the Association, and subsequently, of the Guild (R. 23, 26; 103, 130, 139). On the morning after the Association elected its officers, Mahoney, petitioner's business manager, interrogated her concerning the activities of the union and sought unsuccessfully to dissuade her from continuing to participate (R. 26; 132). On the following day Harden's old duties were taken from her and no effort was made to find other work for her to do (R. 26–27, 34; 133–135). Soon afterwards, Harden was discharged with a letter which assigned "neglect of [her] work, disregard of instructions, and interfering with the work of others in the department as the reasons therefor" (R. 27; 136, 273). At the hearing petitioner introduced no evidence whatever to support these allegations of delinquency. The true reason for the discharge appears instead

from the statement of Gaylor who announced "We got rid of two members of the Union this morning, John Silveira, who was vice president, and Mary Harden, who was secretary * * *" (R. 167).

Sylvester Boff was first employed by petitioner in September 1944 as advertising salesman and collector for the Cape Cod Standard-Times (R. 27; 188). His superiors were Houser, publisher and editor, Gaylord, business manager, and Stiles, advertising manager (R. 27–28; 154, 188, 249, 282). All three complimented Boff on several occasions on the character of his work (R. 28; 191). Early in February, however, Houser and Gaylord volunteered to Boff that a union was being formed, that it would not succeed, and that it was "really like a couple of gangsters living off the profits of the youngsters" (R. 27; 189). On or about February 14, Boff signed an application card for membership in the Association (R. 27; 189, 192–193). On the following day, Houser and Gaylord informed Boff that they knew of his joining the Association. After considerable discussion on the subject, Houser suddenly interrupted with the statement, "We are getting off the track. Your work is not as efficient as it should have been. In other words we are going to let you go for inefficiency" (R. 28; 190–191, 197–198). Boff was thereupon discharged (R. 28; 188, 192). Peti-

tioner's charge of inefficiency against Boff is wholly unsupported (R. 34–35).[4]

Edmund B. Ellison had been employed for seventeen years and became circulation manager of the Cape Cod Standard-Times (R. 28–29; 151–152). Ellison joined the Association on January 29, 1945, and became an active union worker (R. 28; 152–154, 275). On February 2, Ellison was summoned to a conference with Mahoney who spent approximately four hours arguing with Ellison and warning him that his future was being jeopardized by his affiliation with the Union (R. 28–29; 154–157). On February 5, Ellison was accused of discussing union activities on company time. This Ellison denied (R. 29; 158). On February 14, after a long conference with Houser and Gaylord, Ellison was discharged assertedly for inducing carriers to break their contracts with petitioner, collecting money for which no accounting was made, and participating in outside business activities on company time (R. 29; 163–164,

[4] The evidence shows that Boff increased the amount of advertising space sold by his predecessor very substantially (R. 28; 194–197). Petitioner's evidence tended to show merely that the total receipts from the new space sold by Boff exceeded petitioner's total expenses in connection with his work by a small amount (R. 255–260 295). This of course does not refute Boff's statement that he had improved remarkably upon his predecessor's record, nor does it reflect upon Boff's other substantial duties of servicing old accounts and acting as a collector (R. 188, 193–194).

277). The charge that Ellison had induced breaches of contract referred to Ellison's alleged activities in obtaining carrier boys as members of the Association. However, Ellison had never actively signed up carrier boys (R. 30; 164).

With reference to the charge that Ellison had participated in outside business activities on company time, the Board found that this claim was based on the fact that Ellison had had a part-time job which he had left eight or nine months before his discharge (R. 29; 165). Cooper, then Ellison's superior, had given permission to Ellison to take this job (R. 29; 165). Houser also was fully informed of the facts at least a month before Ellison's discharge but had no criticism to offer (R. 29; 165). Many of petitioner's employees had part-time jobs elsewhere and petitioner had no rule forbidding outside employment (R. 29–30; 166).

The remaining charge was predicated on the fact that Ellison, like Silveira, maintained a kitty. The record shows that all of the district managers with one exception did so (R. 32, 60; 159–160). Gaylord, Ellison's superior, had known of the existence of the "kitty" for at least six months prior to Ellison's discharge and had approved of the practice (R. 29; 159–160). Three other district managers in the same area maintained "kitties" (R. 60; 160–161). These managers were not discharged (R. 60; 161). It was uncontra-

dicted that Ellison at no time used any "kitty" money for his own benefit (R. 33; 163, 276).

William Thompson was employed at petitioner's Hyannis office on July 22, 1944, as a truck driver (R. 30; 200–201). In the middle of January 1945 he was promoted to district circulation manager (*ibid.*). On February 15, he was discharged (*ibid.*).

Thompson joined the Association late in January (R. 30; 202). Early in February, while Thompson was attending an Association meeting, Houser and Gaylord paid several visits to his home (R. 30; 202). A few days later they called Thompson into their office, questioned him concerning his union sympathies, and, when he admitted his membership in the Association, informed him that the Association's organizers "were a bunch of racketeers" (R. 30; 202–203). On February 15, Thompson was discharged "for soliciting carrier boys to break their contracts" (R. 30; 204). This was petitioner's characterization of Thompson's activities in asking the boys to sign Association application cards (R. 30, 35; 202, 204–205, 279).[5] No evidence was ever offered that

[5] The evidence shows that Thompson's solicitation of the carrier boys was undertaken pursuant to a resolution of the Newspaper and Radio Workers Protective Association of Southeastern Massachusetts; that the carrier boys were asked to sign application cards for membership in that organization; and that that organization sought to represent the newsboys in collective bargaining (R. 204, 208). Under these circumstances, it is clear that Thompson's activities

Thompson urged any carrier to break his contract with petitioner.*

Bilsborrow Ainsworth, a truck repairman (R. 30–31; 213, 220), had twice received increases in pay during his two years of service with petitioner, the second increase having been granted about 2 months prior to his discharge on February 21, 1945 (R. 30–31; 211, 215–216, 220, 222, 280). On or about January 29, 1945, he joined the Association and became an active member attending meetings regularly (R. 31; 211–212, 279–280). On February 18th, Ainsworth went to the Association meeting and, as he was entering and leaving, saw Kelleher who was obviously watching the union meeting hall (R. 31, 212–213). Three days later he was discharged, allegedly for neglect of work in sending out trucks which were unfit for duty, taking time out while on duty, interfering with the work of others, and disloyalty to management (R. 31, 35; 215–216, 280). Apart from Ainsworth's union affiliation, the sole basis for these charges was the fact that on three or four occasions between February 10 and 13,

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were undertaken on behalf of that organization, and not on behalf of some other "Newspaper Carriers' Association" as petitioner asserts (Pet. 18, 29).

* The legality of Thompson's conduct in urging the newsboys to designate the Association as collective bargaining representative despite the fact that there were in existence individual contracts between the newsboys and petitioner is not open to question. *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332.

a truck about four years old, which had travelled almost 200,000 miles on the same motor, required repairs (R. 31; 217–218, 220). It was uncontradicted that these occasions could not have been anticipated (R. 31; 220–223).[1] None of the other sixteen trucks which Ainsworth maintained gave any trouble and his work was never criticized in any way (R. 30; 220–221).

Manuel Simas, a truck driver, was discharged without notice on March 20, 1945, after a year of service (R. 31; 224, 227). Like the other dischargees, Simas had joined the Association at its inception and became an active member (R. 31; 224–225). Shortly prior to his discharge Simas was told by Mahoney, "We were afraid of you because you belonged to the Guild" (R. 31; 226). Mahoney assigned several reasons for this discharge: "having wet bundles every week;" telling the carriers at Branch C that Branch A was on a strike; refusing to unload the truck at Branch A; and causing a riot at Branch C (R. 31–32; 227–228). Petitioner presented no evidence in support of these charges. Simas, aside from admitting that he had answered affirmatively when asked at Branch C whether the carriers at Branch A were on strike, denied engaging in any of the alleged derelictions (R. 32; 228–231).

[1] Although this offense occurred between February 10th and February 13th, no action was taken until after Ainsworth's attendance at the carefully watched union meeting of February 18th.

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During the hearing before the trial examiner, petitioner applied for a subpoena to require the appearance of Dr. A. Howard Myers, the Board's former director for the region involved, and asked that the Board's attorney in the case be required to produce certain Board records (R. 61; 250–254). Petitioner explained that it desired this evidence for the purpose of showing that petitioner's supervisors had instigated the formation of the Association and that the Guild then took over the Association (R. 61; 250–254). The trial examiner denied these requests (R. 61; 254–255). The Board affirmed, pointing out that "Neither the character of the Association as an unlawfully dominated labor organization, nor the alleged activity of Cooper in behalf of the Association while he was a supervisory employee (which relates only to the character of the Association), are issues raised by the pleadings in this proceeding, nor is such evidence material to any issues in the case" (R. 61–62).

The Board concluded that petitioner had, in violation of Section 8 (1) and (3) of the Act, invaded the rights guaranteed employees in Section 7. The Board found that petitioner's offensive against the Association and the Guild was undertaken not to protect petitioner's neutrality, nor to shield it against charges of unfair labor practices which might stem from the assistance rendered the Association or the Guild by supervisory em-

ployees, but solely because of petitioner's hostility to unionization and to the exercise by employees of the rights guaranteed to them in the Act (R. 59–61). The Board rejected petitioner's contention that because the Association may have been assisted or dominated by supervisory employees, in violation of Section 8 (2), the employee members of that organization could, with impunity, be discharged for exercising their organizational rights guaranteed them under the Act (*ibid.*). The Board ordered petitioner to cease and desist from its unfair labor practices, to offer reinstatement to five of the discharged employees and to make whole the seven employees for earnings lost because of petitioner's discrimination, and to post appropriate notices (R. 62–64).

On September 5, 1946, petitioner filed in the court below a petition to review the Board's order (R. 2–14). On October 15, 1946, the Board filed its answer and request for enforcement (R. 14–19). On February 14, 1947, petitioner filed a motion in the court below (R. 297–309), alleging, *inter alia,* that on January 16, 1947, Kramer and Cooper had pleaded guilty in the Superior Court of the Commonwealth of Massachusetts to an indictment charging that they conspired to conduct a business in competition with petitioner, their employer, in violation of their fiduciary duty (R. 306). Petitioner further alleged that the acts

referred to in the indictment occurred for the most part prior to January 27, 1945, and constituted an integral part of a scheme to take over petitioner's business for their own personal ends. Petitioner's motion prayed that the Board be directed to take and consider this evidence as well as other evidence rejected by the Board (R. 61–62) bearing on the activities of Kramer and Cooper and the "illegal" nature of the Association (R. 307–308). Petitioner prayed also that the Board be ordered to receive in evidence and consider official records of the Weather Bureau contradicting in part Simas' testimony concerning the state of the weather during the time that certain of the incidents involved in the case occurred (R. 307). On June 23, 1947, the court below, Justice Clark dissenting, issued its decision denying petitioner's motion and granting the petition of the Board to enter a decree enforcing its order (R. 320–329, 330).

ARGUMENT

1. Petitioner's contention (Pet. 3–6, 15) that substantial evidence is lacking to support the Board's findings that petitioner interfered with, restrained and coerced its employees and discharged because of their union membership and activities rather than for the reasons assigned by petitioner, presents no question of general importance in the administration of the Act. In any event, as the facts set forth in the Statement show (*supra,* pp. 4–15) and as the court below held

(R. 322–325), the Board's findings that the discharges were acts of reprisals against the employees for union activity and affiliation are abundantly supported by petitioner's outright declaration of hostility to unionization (*supra*, pp. 5–7), its questioning of employees as to their union sympathies (*supra*, pp. 6, 9, 13), its surveillance of union meetings (*supra*, pp. 6, 14), and its threats of discharge for continued affiliation with the Association or the Guild (*supra*, pp. 6, 7). The precipitate discharge of seven long term and previously valued employees soon after they joined a labor organization to which petitioner was avowedly hostile is, on this record, explicable in no other way.

2. Petitioner contends (Pet. 16–17, 23–26), that because supervisory employees aided the formation of the Association, that organization was, as a matter of law, dominated and supported by the employer, and was "illegal" within the meaning of Section 8 (2). Petitioner further argues that such an "illegal" organization could be destroyed, and that, therefore, the discharge of employees for belonging to it could not be deemed violative of Section 8 (1) and (3). This contention rests upon a misapprehension of the nature of the alleged "illegality" of a labor organization "dominated" or supported in violation of Section 8 (2), as well as the nature of the rights confered upon employees by the Act. It is upon this misappre-

hension that petitioner's claim of conflict with *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, is based.

Section 8 (2) prohibits an employer from dominating, supporting, or interfering with any labor organization, and if this prohibition is flouted, the employer may be precluded from further recognizing or bargaining with the dominated organization and thereby reaping the advantages of imposed subservience. As the court below pointed out, the " 'disestablishment' of such organizations * * * is the severance of bargaining relations" (R. 326). In no case has the Board or any court gone beyond this and ordered an employer to "destroy" a dominated organization, either by discharging its officers and members or in any other manner. In ordering the disestablishment of labor organizations held to have been unlawfully dominated by supervisory employees, the Board has never required the discharge or discipline of the offending supervisor.[8] Indeed, the Board

[8] See for example, *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518–519, 521–523, enforcing 10 N. L. R. B. 963, 988–990; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 592–600, enforcing 12 N. L. R. B. 854, 883–885; *R. R. Donnelley & Sons Co.* v. *National Labor Relations Board*, 156 F. 2d 416 (C. C. A. 7), enforcing 60 N. L. R. B. 635, 644–645; *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. 2d 589 (C. C. A. 7), enforcing 24 N. L. R. B. 893, 912–913; *National Labor Relations Board* v. *Idaho Refining Co.*, 143 F. 2d 246, 248 (C. C. A. 9), enforcing 47 N. L. R. B. 1127, 1134–1136.

could not so order, for "Section 10 (c) was not intended to give the Board power of punishment or retribution for past wrongs or errors." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. at 250.*

Section 8 (3) of the Act renders it unlawful for an employer "by discrimination" to "discourage membership in any labor organization." A labor organization, whether or not dominated or supported within the meaning of Section 8 (2), is nevertheless a labor organization within the meaning of this Section (Section 2 (5)). It follows, as the Board and the court below held (R. 58–61, 325–326), that employer discrimination for the purpose of discouraging membership in a dominated labor organization is no less unlawful than discrimination to discourage membership in an undominated organization. The consequence of a contrary holding, as the court below pointed out, would be frustration of the Act (R. 325–326):

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* The language in the *Newport News* case to which petitioner refers (Pet. 16), does not support the proposition for which it is cited. The Board's order enforced in that case required only that the company cease utilizing the illegal employee-representation plan as a medium for collective bargaining with employees. In no sense was the company required to "destroy" the plan, and this court's opinion, explaining and upholding the disestablishment requirement, establishes clearly that it was only as a method for continued dealing between the employees and the company that the plan was not to be "permitted to continue in force."

> Thus, the argument in actual essence is that if a company interferes with a union enough to make it illegal, employees can then be discharged for belonging to it. That obviously cannot be so. The process would be too simple. To prevent unionization, all an employer would have to do would be to interfere with it.
>
> The extent of the right of an employer under Section 8 (2) is to reverse the wrong he himself has committed; that is to eliminate the domination or interference he himself has exercised or caused. He cannot by dominating or interfering with a union, confer upon himself a right which he would otherwise not have, that is, the right to destroy the union. The language of the section is designed to protect the labor organization from interference or domination by the employer, not for the protection of the employer against the organization of a union.

Moreover, as the Board pointed out (R. 59–61), petitioner's efforts to destroy the union by discriminatory discharges as well as other intimidating tactics were not undertaken for the purpose of shielding petitioner from unfair labor practice charges or in an attempt to eradicate the effects of supervisory domination. On the contrary, petitioner never once intimated to the employees that it regarded the Association or the Guild as a dominated organization which it was bound to refrain from recognizing, or that its

hostility to these organizations and its discrimination against their members stemmed from this fact. Under these circumstances, it is clear, as the Board found (R. 60, 61), that the discharges of both supervisory and nonsupervisory employees were intended to discourage union membership among both classes of employees, not only in the Association or the Guild, but in labor organizations generally. In holding such widespread infringement of the right of employers to join labor organizations unjustified by the wholly fortuitous circumstance that supervisors had assisted the labor organization immediately involved, the Board and the court below recognized that such violations go "to the very heart of the Act." *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4); *Eagle-Picher Mining and Smelting Co.* v. *N. L. R. B.*, 119 F. 2d 903, 911, 913 (C. C. A. 8); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643. There are no conflicting decisions.

Petitioner's contention (Pet. 10–11, note 5, 16, 23–24, 27–28) that the Board erred in refusing a subpœna directing Dr. Meyers, a former Regional Director of the Board, to testify, and in refusing to order the Board's attorney to produce certain papers from the file of the regional office, rests entirely upon petitioner's assertion that the

Board erred in holding immaterial to the issues here presented the question whether the Association was formed or assisted by supervisory employees. A review of the offer of proof demonstrates that the proffered evidence would have tended to show only that the Association was company dominated within the meaning of Section 8 (2). The Board's refusal to order the production of this evidence, therefore, presents no independent issue.

The instant case presents no question concerning the right of an employer, in order to protect his neutrality, to discipline supervisors who infringe the organizational freedom of rank and file employees (R. 60). The situation here presented, in which an employer seeks to justify the discriminatory discharge of rank and file as well as supervisory employees solely because of their participation in the activities of a labor organization, is unique among Board cases and gives rise to no question of general importance in the administration of the Act.

3. Petitioner's contention (Pet. 10–14, 16, 22, 23–24, 26–29) that the court below erred in denying petitioner's motion for leave to adduce certain evidence relating to the motives of Kramer and Cooper in forming the Association, and certain other evidence relating to the rainfall at New Bedford during the month of March 1945, presents no question of importance in the adminis-

tration of the Act. As the court below properly held, since neither Kramer nor Cooper were found by the Board to have been discriminatorily discharged, their relations with petitioner can have no bearing on the issues here involved (R. 328). And, of course, their motives in forming the Association are irrelevant to the issue whether the Association, which existed for the purpose of collective bargaining with petitioner, was, as the Board found (R. 22, 67), a labor organization within the meaning of Section 2 (5) of the Act.

Similarly, petitioner's offer to show that, contrary to Simas' testimony at the hearing, rain had fallen during the period prior to his discharge, was properly rejected by the court below, since such evidence would not have served to rebut Simas' uncontradicted testimony as to the only fact in issue, i. e., whether the bundles Simas delivered were wet. Petitioner made no attempt to prove the bundles wet and, of course, no conflict of decisions is claimed.

4. As the facts set forth in the Statement show (pp. 7–9, 11–14), and as the Board found (R. 32–33, 35, 60–61), Silveira, Ellison, and Thompson were discharged for engaging in union activities and not for "cause", as petitioner asserts (Pet. 4–5). Therefore, petitioner's question numbered 5, (Pet. 14) is not presented.

The facts set forth in the Statement also show (*supra*, pp. 13–14, note 5) that Thompson was dis-

charged for his activities on behalf of the Newspaper and Radio Protective Association of Southeastern Massachusetts. Since petitioner's question numbered 7 (Pet. 14–15) erroneously assumes that Thompson was discharged because of activities on behalf of a different organization (see note 5, pp. 13–14, *supra*), the "Newspaper Carriers' Association" (Pet. 18, 22–23, 29–30), that question is likewise not presented.

5. Petitioner seeks to raise the question whether the Board could properly order the reinstatement of employees who did not ask for reinstatement (Pet. 15, 30). However, petitioner raised no such objection before the Board despite the fact that the Trial Examiner's Intermediate Report recommended reinstatement of these employees (R. 43). Petitioner is, therefore, precluded from raising the question in this Court (Section 10 (e)). *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388–389; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 256.

CONCLUSION

The decision below is correct in all respects here challenged, and presents no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

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SEPTEMBER 1947.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or with-

out back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of

the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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